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IN THE

Supreme Court of the United States

70-165

OCTOBER TERM, 1970

No. ~~1703~~

ESTATE OF GLORIA A. LION, DECEASED, MORTON E. ROME AND GEORGE L. CLARKE, EXECUTORS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MORTON E. ROME,

GEORGE L. CLARKE,

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ESTATE OF GLORIA A. LION, DECEASED, MORTON E. ROME AND GEORGE L. CLARKE, EXECUTORS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Estate of Gloria A. Lion, deceased, Morton E. Rome and George L. Clarke, Executors, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 12, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-11a) is reported at ..... F. 2d ....., 71-1 U.S.T.C. ¶12,745. The opinion of the Tax Court (App. 11a-21a) is reported at 52 T.C. 601.

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1971 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A husband and wife were killed in an airliner crash. The order of their deaths is unknown; but the husband's will contained a presumption that, in such circumstances, the wife was presumed to have survived him. His will gave his estate to his wife for life in the form of marital and residuary trusts with remainders to children. The estates of both spouses were subject to federal estate tax; and, based upon the presumption aforesaid (which the Government accepted and applied and to which it offered no evidence in rebuttal in the instant case), a marital deduction was allowed in the husband's estate. Under 26 U.S.C. 2013, the wife's estate is entitled to a credit against its tax based on the tax attributable to her life estate in the residuary trust, which was taxed in her husband's estate. The question presented is whether, in computing the credit against tax in the wife's estate, the value of her life estate in the residuary trust is determined by the use of the Government mortality tables contained in the estate tax regulations?

STATUTES AND REGULATIONS INVOLVED

The Internal Revenue Code provides, in pertinent part (Title 26, United States Code):

> "Sec. 2013. CREDIT FOR TAX ON PRIOR TRANSFERS.
>
> (a) *General Rule.*—The tax imposed by section 2001 shall be credited with all or a part of the amount of the Federal estate tax paid with respect to the transfer of property (including property passing as a result of the exercise or non-exercise of a power of appointment)

to the decedent by or from a person (herein designated as a 'transferor') who died within 10 years before, or within 2 years after, the decedent's death. If the transferor died within 2 years of the death of the decedent, the credit shall be the amount determined under subsections (b) and (c). * * *.

(b) *Computation of credit.*—Subject to the limitation prescribed in subsection (c), the credit provided by this section shall be an amount which bears the same ratio to the estate tax paid (adjusted as indicated hereinafter) with respect to the estate of the transferor as the value of the property transferred bears to the taxable estate of the transferor (determined for purposes of the estate tax) decreased by any death taxes paid with respect to such estate and increased by the exemption provided for by section 2052 or section 2106(a)(3) or the corresponding provisions of prior laws, in determining the taxable estate of the transferor for purposes of the estate tax. For purposes of the preceding sentence, the estate tax paid shall be the Federal estate tax paid increased by any credits allowed against such estate tax under section 2012, or corresponding provisions of prior laws, on account of gift tax, and for any credits allowed against such estate tax under this section on account of prior transfers where the transferor acquired property from a person who died within 10 years before the death of the decedent.

* * * * * *

(d) *Valuation of Property Transferred.*—The value of property transferred to the decedent shall be the value used for the purpose of determining the Federal estate tax liability of the estate of the transferor * * *.

(e) *Property Defined.*—For purposes of this section, the term 'property' includes any beneficial interest in property, including a general power of appointment (as defined in section 2041)."

Treasury Department Regulations, 26 C.F.R. 20.2013, provide, in pertinent part, as follows:

"Sec. 20.2013-1. CREDIT FOR TAX ON PRIOR TRANSFERS.

(a) *In general.* A credit is allowed under section 2013 against the Federal estate tax imposed on the present decedent's estate for Federal estate tax paid on the transfer of property to the present decedent from a transferor who died within ten years before, or within two years after, the present decedent's death. See section 20.2013-5 for definition of the terms 'property' and 'transfer.' There is no requirement that the transferred property be identified in the estate of the present decedent or that the property be in existence at the time of the decedent's death. It is sufficient that the transfer of the property was subjected to Federal estate tax in the estate of the transferor and that the transferor died within the prescribed period to time. The executor must submit such proof as may be requested by the district director in order to establish the right of the estate to the credit."

* * * * * *

"Sec. 20.2013-4. VALUATION OF PROPERTY TRANSFERRED.

(a) For purposes of section 2013 and sections 20.2013-1 through 20.2013-6, the value of the property transferred to the decedent is the value at which such property was included in the transferor's gross estate for the purpose of the Federal estate tax (see sections 2031, 2032, and the regulations thereunder) reduced as indicated in paragraph (b) of this section. If the decedent received a life estate or remainder or other limited interest in property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death on the basis of recognized valuation principles (see especially section 20.2031-7)."

* * * * * *

"Sec. 20.2013-5. 'PROPERTY' AND 'TRANSFER' DEFINED.

(a) For purposes of section 2013 and sections 20.2013-1 through 20.2013-6, the term 'property' means any beneficial interest in property, including a general power of appointment (as defined in section 2041) over

property.' Thus, the term does not include an interest in property consisting merely of a bare legal title, such as that of a trustee. Nor does the term include a power of appointment over property which is not a general power of appointment (as defined in section 2041). Examples of property, as described in this paragraph, are annuities, life estates, estates for terms of years, vested or contingent remainders and other future interests.

(b) In order to obtain the credit for tax on prior transfers, there must be a transfer of property described in paragraph (a) of this section by or from the transferor to the decedent. The term 'transfer' of property by or from a transferor means any passing of property under circumstances which were such that the property or interest was included in the gross estate of the transferor. * * *."

STATEMENT

The facts are as set forth by the opinion of the Court of Appeals (App. 2a-3a):

"On May 12, 1963, Gloria A. Lion and her husband were both killed in an airplane crash near Cairo, United Arab Republic. There were no survivors, and the circumstances were such that there was no sufficient proof to determine the chronology of their deaths. Mr. Lion's will created a marital trust, and a second trust of the rest and residue of his estate. The residuary trust was for the benefit of Mrs. Lion for life, and Mrs. Lion was given a limited noncumulative power to invade the corpus. Mr. Lion's will stated a presumption of his wife's survivorship in the event of simultaneous deaths, or deaths under circumstances making proof of the chronology of their deaths insufficient.[1] The settlement of Mr. Lion's estate and payment of the federal

[1] Cf., Article 35, Annotated Code of Maryland (1957), Sections 83 and 88 ("Uniform Simultaneous Death Act"), not cited in the opinion of the Court of Appeals.

estate tax thereon proceeded on the basis of the presumption and was accepted by the Commissioner. Property passing to Mrs. Lion and others under the residuary trust was taxed to Mr. Lion's estate.

"In Mrs. Lion's estate tax return, a tax credit of $121,309.27 was claimed under 26 U.S.C.A. §2013, based upon the actuarial value of her life estate in the residuary trust created by her husband. Section 2013 provides a credit against estate taxes where the decedent has recently received property in a transfer itself subject to estate tax. This credit accrues even if the transferred property does not in fact pass through the recipient's estate; thus, the transferred property may be merely a life interest. It is the correctness of the claim which is at issue here."

The jurisdiction of the Tax Court of the United States was invoked by 26 U.S.C. 6213.

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning the administration of the federal estate tax laws in situations where multiple deaths occur in common disaster accidents under circumstances which make it difficult or impossible to ascertain the chronology or sequence of deaths of the persons killed but a presumption is employed to establish that sequence. This case involves deaths of spouses traveling in a commercial airliner but its impact will affect cases of common disaster deaths from automobile and other modes of transportation, the numbers of which appear to increase steadily. The will of one spouse, usually the husband, commonly employs a presumption of the survivorship of his wife to assure that his estate will enjoy, at least, the benefits of the marital deduction under the federal estate tax laws.

If the husband's will (containing a presumption of his wife's survivorship) purports to convey his estate, in trust

or otherwise, to his wife, despite her death in the common disaster, the property taxed in the husband's estate is once again subjected to tax in the wife's estate. To avoid a burdensome shrinkage of the estates of the two decedents who die within so short a period of each other, the double tax is alleviated by a credit against tax in the wife's estate. 26 U.S.C. 2013; H.R. Rep. No. 767, 65th Cong., 2d Sess., p. 22; Sen. Rep. No. 1622, 83d Cong., 2d Sess., p. 121. The credit is based upon two factors: the lapse of time between the two deaths (26 U.S.C. 2013(a)) and a calculation of the tax attributable to certain property in the husband's estate (26 U.S.C. 2013(b) and (c)). The calculation of the credit does not require that the property, which is subjected to tax in the husband's estate, be included in the tax base of the wife's estate; and, in fact, a life estate of the wife in such property provides a basis for the credit in her estate despite the fact that her life estate is terminated by her death. Sen. Rep. No. 1622, *supra* at p. 463; 26 C.F.R. 20.2013-1, 20.2013-4 and 20.2013-5. The Court of Appeals so held (App. 3a).

In attempting to avoid the application of the mortality tables required by the decision of this Court in *Ithaca Trust Company v. United States*, 279 U.S. 151 (1929), the Court of Appeals closed its eyes: first, to the statistics of survival of airliner accidents stipulated as facts by the parties hereto (App. 16a);[2] second, to the legislative history of 26 U.S.C. 2013; and, third, to the impact of the decisions of the Fourth, Fifth, Sixth and Ninth Circuit Courts of

[2] Even if it were proper to consider the probabilities of survival of an airliner accident, instead of the mortality tables, to determine the value of the life estate, the opinion of the Court of Appeals disregards the stipulated statistics of survival of such accidents, which demonstrate that the rate of survival is quite high; and it concluded by hindsight, unsupported by evidence, that deaths of the testator and the life tenant were "certain to be imminent" (App. 7a).

Appeal in *Estate of Meltzer v. Commissioner*, ... F. 2d ....., 71 U.S.T.C. ¶12,754 (4th Cir., 1971); *Estate of Wien v. Commissioner*, ... F. 2d ....., 71 U.S.T.C. ¶12,764 (5th Cir., 1971); *Old Kent Bank and Trust Company v. U. S.*, 430 F. 2d 392 (6th Cir., 1970); and *Estate of Chown v. Commissioner*, 428 F. 2d 1395 (9th Cir., 1970).

I.

ITHACA TRUST PRECLUDES THE APPLICATION OF THE HINDSIGHT YARDSTICK, USED BY THE COURT OF APPEALS, IN THE DETERMINATION OF FEDERAL ESTATE TAX CONSEQUENCES.

In holding that *Ithaca Trust* "is quite unlike to one in which the life tenant's death was certain to be imminent at the time of the testator's death" (App. 7a), the Court of Appeals not only ignored the stipulation of the parties setting forth survival statistics in airline accident cases (App. 15a-16a), but it employed the very hindsight yardstick which Justice Holmes rejected as "inaccurate thinking".

In *Ithaca Trust, supra*, the testator gave his residuary estate in trust to his widow for life and after her death to certain charities. The question was whether the amount of the diminution of the life estate in fixing the value of the charitable remainder is to be determined by the event, as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. *Ithaca Trust, supra*, supports the rule that hindsight cannot be applied in the determination of value as of the date of the taxable act. This Court, through Justice Holmes, stated that the first impression is that it is absurd to resort to statistical problems when you know the fact (279 U.S., at page 155):

> "But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's

> death. [Citation] The tax is on the act of the testator not on the receipt of property by the legatees. [Citations] * * * Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. [Citation] Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables * * *".

While certain lower court decisions appear to ignore the *Ithaca Trust* rule,[3] the principle for which it stands has been recognized repeatedly. Cf. *Provident Trust Co. v. U. S.*, 291 U.S. 272 (1934), and *Commissioner v. Sternberger*, 348 U.S. 187 (1955).

Thus, in *Bankers Trust Co. v. Higgins*, 136 F. 2d 477 (2nd Cir., 1943), Judge Learned Hand upheld the use of mortality tables in the following words, at page 479:

> "When compelled to take present action based upon forecasts of a man's life, Courts have for long been accustomed to use mortality tables; for, although logicians may say that probability never tells us anything about a given instance, in fact we never make a decision or take a step, except in reliance upon it; and it so happens that in this particular matter the probability has been refined by averaging an enormous number of instances."

And, in *Gelb v. Commissioner*, 298 F. 2d 544 (2nd Cir., 1962), at page 551, Judge Friendly stated:

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[3] E.g., *Estate of Nellie H. Jennings*, 10 T.C. 323 (1948); *Huntington National Bank of Columbus*, 13 T.C. 760 (1949); *Estate of Nicholas Murray Butler*, 18 T.C. 914 (1952); and *Estate of John P. Hoelzel*, 28 T.C. 384 (1957). Contra: *Chauncey Stillman*, 24 TCM 478, T.C. Memo 1965-94, where the Tax Court upheld use of the tables upon the authority of *Ithaca Trust*, *supra*, and asserted that the *Jennings* group of cases, *supra*, to be incorrect as a matter of law.

> "Yet the use of actuarial tables for dealing with estate tax problems has been so widespread and of such long standing[7] that we cannot assume Congress would have balked at it here; the United States is in business with enough different taxpayers so that the law of averages has ample opportunity to work." (Footnote 7, omitted here, contains a concise history of the Government's usages of the tables for tax purposes, beginning in 1863.)

Indeed, in Rev. Rul. 66-307, 66-2 C.B. 429, the Government states that,

> "For estate tax purposes, the value of life and remainder interests must be determined from facts available at the time of the death of the decedent. That the life tenant may in fact survive the decedent by only a short period of time is not controlling. *United States v. Provident Trust Co.*, 291 U.S. 272, Ct. D. 797, C.B. XIII-1, 365 (1934). The actuarial tables prescribed in section 20.2031-7 of the Estate Tax Regulations reflect deaths of those who die prematurely from all causes as well as those who enjoy greater longevity."

II.

THE COURT OF APPEALS FAILED TO GIVE EFFECT TO THE LEGISLATIVE HISTORY OF SECTION 26 U.S.C. 2013.

The Senate Committee Report (Sen. Rep. No. 1622, 83d Cong., 2d Sess., at p. 463) and the interpretative regulation (26 C.F.R. 20.2013-1(a)), in response to defects of prior law, emphasize that the term "transfer of property" and hence, the credit "is broad enough to cover the transmission of property by the transferor to the decedent under any condition or form of ownership which requires the inclusion of such property in the transferor's gross estate". See, also, H.R. Rep. No. 1495, 84th Cong., 1st Sess.; Sen. Rep. No. 1402, 84th Cong., 2d Sess.

The legislative history of 26 U.S.C. 2013 demonstrates the Congressional intent to value property subject to the credit in precisely the same manner in which property qualifying for the marital deduction under 26 U.S.C. 2056 is valued. Thus, the Congressional Committee Report (Sen. Rep. No. 1622, 83d Cong., 2d Sess., at page 463) states:

> "'The term 'transfer of property' is broad enough to cover the transmission of property by the transferor to the decedent under any condition or form of ownership which requires the inclusion of such property in the transferor's gross estate. This is a clarification which was not expressed in the House Bill.
>
> "In order to qualify for the credit it is not essential under this section that the property transferred be identified in the estate of the decedent. However, the property must be included in the gross estate of the transferor * * *."

The Senate Report, *supra*, at page 467, explained its version of the changes as follows:

> "Your committee has revised subsection (d) so as to provide that the value of property transferred to the decedent shall be determined in the same manner as the value of property interests passing to a surviving spouse under Section 2056 [providing for a marital deduction] is determined. Your committee believes that this amendment will provide for greater certainty."

The Government recognized and applied the presumption of survivorship for marital deduction purposes under 26 U.S.C. 2056 and, indeed, gave it full effect without regard to the duration of the life of the surviving spouse. The Government offered no evidence to rebut the presumption in the instant case; and it should be afforded a like effect for determination of the tax credit under 26 U.S.C. 2013.

The Court of Appeals expressly noted (App. 4a),

> "that the Commission (sic) is in a peculiarly weak position to urge that we should decide that the life estate in the residuary trust created by Mr. Lion failed to become possessory, even momentarily, since the Commissioner has already acquiesced in the position of Mr Lion's executors that the marital trust became possessory, by virtue of the presumption of survivorship stated in Mr. Lion's will. * * *"

By the same token, the legislative history cited above requires that the full value of the credit, under the mortality tables, be allowed.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT CONFLICTS WITH ITS OWN DECISION IN THE CASE OF ESTATE OF *MELTZER v. COMMISSIONER*, ... F. 2d ....., 71 U.S.T.C. ¶12,754 (4TH CIR., 1971); AND WITH THE DECISIONS OF THE FIFTH, SIXTH AND NINTH CIRCUITS IN ESTATE OF *WIEN v. COMMISSIONER*, ... F. 2d ....., 71 U.S.T.C. ¶12,764 (5TH CIR., 1971); *OLD KENT BANK AND TRUST COMPANY v. U. S.*, 430 F. 2d 392 (6TH CIR., 1970);[4] AND *ESTATE OF CHOWN v. COMMISSIONER*, 428 F. 2d 1395 (9TH CIR., 1970), RESPECTIVELY.

The lower Court decisions of *Wien, Old Kent* and *Chown, supra*, were cited as the controlling authorities by the Tax Court in this case (App. 19a); but all three decisions have since been reversed. *Meltzer, supra*, in the Fourth Circuit conforms to this pattern (cf. App. 9a).

The decision of the Court of Appeals here conflicts with the uniform decisions of all four Circuits (including the Fourth) involving insurance policies. Its departure in this

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[4] In *Old Kent*, the second issue, involving a relatively small amount of estate tax but decided by the trial court against the taxpayer, 292 F.S. 48 (W.D. Mich., 1968), was withdrawn on appeal to the Sixth Circuit to enable the Court to concentrate on the first issue (the only one argued), namely, the value for estate tax purposes of the life insurance policy there involved.

case from the decisions of these Circuits is based upon differences in the method of valuation of insurance policies set forth under 26 C.F.R. 20.2031-8(a)(1) and (2) from that of valuation of life estates under 26 C.F.R. 20.2031-7. 26 C.F.R. 20.2031-7 and 20.2031-8, however, both reflect the general principles requiring the use of actuarial or mortality tables to value items of property for purposes of the federal estate tax. Both regulations uniformly and consistently value these items of property by employing actuarial or mortality tables. Indeed, there is no difference in principle in the methods provided by the regulations in valuing these items of property with the exception that, in the case of an insurance policy, an insurance company holds the property in question, or the insurance funds, the interpolated terminal reserve value of which is determined by actuarial means, i.e., mortality tables contained in 26 C.F.R. 20.2031-8.

The opinion of the Court of Appeals seeks to differentiate the method of valuation of the life estate herein from that of the methods prescribed for insurance policies in the regulations; and it does so by holding that the recognized valuation principles specified in 26 C.F.R. 20.2013-4(a) need not employ actuarial and mortality tables for a life estate (App. 9a-10a).

With all due deference, what the Court of Appeals did here was to ignore the exhortatory nature of the parenthetical phrase appearing in 26 C.F.R. 20.2013-4(a), "see *especially* §20.2031-7 (emphasis added)", and to make the negative inference that the "regulations thus leave room for departure from strict application of the tables" (App. 6a). In short, the Court of Appeals' position is that because 26 C.F.R. 20.2031-4(a) is not mandatory insofar as the use of the actuarial tables is concerned, it was free to use "rec-

ognized valuation principles" in determining the value of a life estate of one who was about to be involved in an airliner crash.

In so holding, the Court of Appeals: (1) unrealistically concerned itself with the purely hypothetical market place of buyers and sellers of property owned by prospective accident victims; (2) refused to apply *Ithaca Trust, supra;* (3) ignored stipulated survival statistics; (4) ignored the legislative history of 26 U.S.C. 2013; (5) disregarded the implications arising from the reversals by the Fifth, Sixth and Ninth Circuits in the *Wien, Old Kent* and *Chown* cases, *supra*, respectively, of the lower courts' rulings; and (6) reached a conclusion wholly inconsistent with the marital deduction allowed the husband's estate in this case.

Uniformity and consistency of treatment of taxpayers are the primary goals of the federal taxing system. If the tax laws are administered so as to employ the Government's own mortality tables only when, in its arbitrary discretion, it is to the Government's benefit to do so, uniformity and consistency cannot be attained. The tables are constructed on the law of averages, the principal basis of which is that they permit a simplified and uniform administration of the estate and gift tax and give a result that, if not always precisely correct, at least approximates a true value, or is "broadly equitable." Merten's Law of Federal Gift and Estate Taxation, Vol. 1, §7.07. For if the tables are proffered by the estate tax regulations, the regulations have adopted the law of averages to determine life expectancy. The Government has stated that the mortality tables express probabilities of life expectancy, including death from all causes, accidents as well as illnesses; and they reflect untimely deaths as well as exceptional longevities. Rev. Rul. 66-307, 66-2 C.B. 429.

The opinion of the Court of Appeals enables the Government to depart from the use of the tables by hindsight in instances where a life tenant in fact is known to survive for a few minutes, a few months, or a few years; and to depart from the tables by hindsight where death results to a survivor from injuries directly related to the disaster or from other causes indirectly related or to which the disaster contributed. In short, the opinion of the Court of Appeals enables the Government, in its arbitrary discretion, to decide whether to apply the tables.

Unfortunately, it appears that revenue considerations have played a part in the exercise of that discretion. Unless, therefore, this Court would perpetuate the double standard, already condemned by the Circuit Court of Appeals for the Fourth Circuit, *Rosen, et al. v. Commissioner*, 397 F. 2d 245 (1968), reversing 48 T.C. 834 (1967), the ruling of the Court of Appeals for the Fourth Circuit in the instant case should be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

MORTON E. ROME,
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APPENDIX A

United States Court of Appeals
For The Fourth Circuit

No. 14,330

Estate of Gloria A. Lion, Deceased, Morton E. Rome and George L. Clarke, Executors,

Petitioners-Appellants,

versus

Commissioner of Internal Revenue,

Respondent-Appellee.

Appeal from the decision of the Tax Court of the United States.

(Argued December 9, 1970 Decided February 12, 1971)

Before, SOBELOFF, WINTER and CRAVEN, Circuit Judges.

Robert P. Mittelman (Morton E. Rome, George L. Clarke, and Buckmaster, White, Mindel & Clarke, on brief) for Petitioners, and Carolyn R. Just, Attorney, Department of Justice, (Johnnie M. Walters, Assistant Attorney General, Meyer Rothwacks and Thomas L. Stapleton, Attorneys, Department of Justice, on brief) for Respondent.

WINTER, Circuit Judge:

In this appeal we must decide if the taxpayer is entitled to an estate tax credit under 26 U.S.C.A. § 2013 for property previously subjected to estate tax. The credit claimed is for a life estate in a residuary trust created by decedent's

husband with whom she died in a common accident. The Commissioner disallowed the credit and the Tax Court sustained him.[1] We think the Tax Court correctly decided the case, and we affirm.

—I—

The stipulated facts, as found by the Tax Court, may be succinctly stated: On May 12, 1963, Gloria A. Lion and her husband were both killed in an airplane crash near Cairo, United Arab Republic. There were no survivors, and the circumstances were such that there was no sufficient proof to determine the chronology of their deaths. Mr. Lion's will created a marital trust, and a second trust of the rest and residue of his estate. The residuary trust was for the benefit of Mrs. Lion for life, and Mrs. Lion was given a limited noncumulative power to invade the corpus. Mr. Lion's will stated a presumption of his wife's survivorship in the event of simultaneous deaths, or deaths under circumstances making proof of the chronology of their deaths insufficient.[2] The settlement of Mr. Lion's estate and payment of the federal estate tax thereon proceeded on the basis of the presumption and was accepted by the Commissioner. Property passing to Mrs. Lion and others under the residuary trust was taxed to Mr. Lion's estate.

In Mrs. Lion's estate tax return, a tax credit of $121,309.27 was claimed under 26 U.S.C.A. § 2013, based upon the actuarial value of her life estate in the residuary trust created by her husband. Section 2013 provides a credit against estate taxes where the decedent has recently received property in a transfer itself subject to estate tax.[3]

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[1] The opinion in the instant case is reported as *Estate of Lion v. Commissioner*, ___ T.C. ___ (1970).

[2] Mrs. Lion's will contained no comparable provision. Her gifts to her husband were conditioned upon his surviving her for ten days.

[3] The pertinent provisions of 26 U.S.C.A. § 2013 are:

§ 2013. CREDIT FOR TAX ON PRIOR TRANSFERS.

(a) *General rule.* — The tax imposed by section 2001 shall be credited with all or a part of the amount of the Federal estate tax paid with respect to the transfer of property (including property passing as a result of the exercise or non-exercise of a power of appointment) to the decedent by or from a person

This credit accrues even if the transferred property does not in fact pass through the recipient's estate; thus, the transferred property may be merely a life interest.[4] It is the correctness of the claim which is at issue here.

— II —

The Commissioner advances two contentions why a credit under § 2013 should not be allowed. The first is

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(herein designated as a "transferor") who died within 10 years before, or within 2 years after, the decedent's death. * * *

* * * * * *

(d) *Valuation of property transferred.* — The value of property transferred to the decedent shall be the value used for the purpose of determining the Federal estate tax liability of the estate of the transferor * * *

* * * * * * *

(e) *Property defined.* — For purposes of this section, the term "property" includes any beneficial interest in property, including a general power of appointment (as defined in section 2041).

[4] The Treasury Regulations appear in 26 C.F.R. §§ 20.2013-1, *et seq.* The pertinent portions of the applicable sections are:

§ 20.2013-1. *Credit for tax on prior transfers.*

(a) *In general.* A credit is allowed under section 2013 against the Federal estate tax imposed on the present decedent's estate for Federal estate tax paid on the transfer of property to the present decedent from a transferor who died within ten years before, or within two years after, the present decedent's death. See § 20.2013-5 for definition of the terms "property" and "transfer". There is no requirement that the transferred property be identified in the estate of the present decedent or that the property be in existence at the time of the decedent's death. It is sufficient that the transfer of the property was subjected to Federal estate tax in the estate of the transferor and that the transferor died within the prescribed period of time. The executor must submit such proof as may be requested by the district director in order to establish the right of the estate to the credit.

* * * * * *

§ 20.2013-4. *Valuation of property transferred.*

(a) For purposes of section 2013 and §§ 20.2013-1 and 20.2013-6, the value of the property transferred to the decedent is the value at which such property was included in the transferor's gross estate for the purposes of the Federal estate tax (see sections 2031, 2032, and the regulations thereunder) reduced as indicated in paragraph (b) of this section. If the decedent received a life estate or remainder or other limited interest in

that the taxpayer failed to show that there was a "transfer" of a life estate to Mrs. Lion within the meaning of § 2013 since there was no actual proof that she survived her husband. We find it unnecessary to decide whether a "transfer" occurred, because we are satisfied that Mrs. Lion's life estate in the residuary trust created by her husband was valueless, even if we assume that she survived him. We cannot refrain from noting, however, that the Commission is in a peculiarly weak position to urge that we should decide that the life estate in the residuary trust created by Mr. Lion failed to become possessory, even momentarily, since the Commissioner has already acquiesced in the position of Mr. Lion's executors that the marital trust became possessory, by virtue of the presumption of survivorship stated in Mr. Lion's will. The fact is that the Commissioner has collected the tax on the property attributable to Mrs. Lion's estate by virtue of her interest in the marital trust. Nevertheless, assuming but not deciding that Mrs. Lion was vested with a life estate in Mr. Lion's residuary trust mo-

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property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death on the basis of recognized valuation principles (see especially § 20.2031-7). * * *

* * * * * * *

§ 20.2013-5. *"Property" and "transfer" defined.*

(a) For purposes of section 2013 and §§ 20.2013-1 to 20.2013-6, the term "property" means any beneficial interest in property, including a general power of appointment (as defined in section 2041) over property. Thus, the term does not include an interest in property consisting merely of a bare legal title, such as that of a trustee. Nor does the term include a power of appointment over property which is not a general power of appointment (as defined in section 2041). Examples of property, as described in this paragraph, are annuities, life estates, estates for terms of years, vested or contingent remainders and other future interests.

(b) In order to obtain the credit for tax on prior transfers, there must be a transfer of property described in paragraph (a) of this section by or from the transferor to the decedent. The term "transfer" of property by or from a transferor means any passing of property or an interest in property under circumstances which were such that the property or interest was included in the gross estate of the transferor. * * *

* * * * * *

ments before her death, we agree that for federal estate tax purposes the interest was valueless so that her estate is not entitled to a credit under § 2013 for property previously taxed.

The Commissioner's second argument for disallowing a tax credit here is that the life estate, even if it was transferred to Mrs. Lion, had no value. Under § 2013(b), the amount of the tax credit, subject to limitations in § 2013(c) not relevant here, is to bear the same ratio to the total estate tax paid by the transferor as the value of the transferred property bears to the total value of the transferor's taxable estate.[5] Thus, if the transferred property is worth nothing, the tax credit is zero.

The Tax Court held that the life estate was valueless at the time of the transfer, reasoning that on the facts available at the time of Mr. Lion's death a hypothetical buyer would have paid nothing for Mr. Lion's life interest because Mr. and Mrs. Lion were "hurtling to their deaths in the same airline crash." Taxpayer contends that the value of the estate should be determined, not by the special circumstances at the time of Mr. Lion's death, but by standard mortality tables established by regulations of the Commissioner, see particularly § 20.2013-4.

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[5] 26 U.S.C.A. § 2013(b) reads as follows:

(b) *Computation of credit.* — Subject to the limitation prescribed in subsection (c), *the credit provided by this section shall be an amount which bears the same ratio to the estate tax paid* (adjusted as indicated hereinafter) *with respect to the estate of the transferor as the value of the property transferred bears to the taxable estate of the transferor* (determined for purposes of the estate tax) decreased by any death taxes paid with respect to such estate and increased by the exemption provided for by section 2052 or section 2106(a)(3), or the corresponding provisions of prior laws, in determining the taxable estate of the transferor for purposes of the estate tax. For purposes of the preceding sentence, the estate tax paid shall be the Federal estate tax paid increased by any credits allowed against such estate tax under section 2012, or corresponding provisions of prior laws, on account of gift tax, and for any credits allowed against such estate tax under this section on account of prior transfers where the transferor acquired property from a person who died within 10 years before the death of the decedent. (Emphasis supplied.)

Section 2013(d) states generally that the value of the property transferred to the decedent shall be the value used for the purpose of determining the federal estate tax liability of the estate of the transferor. Since § 2013 also extends the credit to transfers of beneficial interests in property, one must look to the regulations to determine the value of property received by a decedent when the decedent received somthing less than the fee and the fee was taxed to the estate of the transferor. Section 20.2013-4 of the regulations deals with this problem, and it states: "If the decedent received a life estate or remainder or other limited interest in property included in the transferor's gross estate, the value of the interest is determined *as of the date of the transferor's death on the basis of recognized valuation principles (see especially § 20.2031-7).*" (Emphasis supplied.) Section 20.2031-7 of the regulations promulgates tables of ages with corresponding factors to compute the present value of annuities, life estates, terms for years, remainders and reversions and also adopts, by reference, other life and actuarial tables which apply to certain special situations.

While the regulations indicate that *ordinarily* the value of a life estate is to be determined by the use of actuarial tables, the use of tables is subject to the underlying premise that what is sought to be achieved is value "as of the date of the transferor's death on the basis of recognized valuation principles." That the tables may or may not reflect "recognized valuation principles" is implicit in the use of the phrase "see *especially* § 20.2031-7" (emphasis added), rather than an imperative phrase, for example, "as determined by § 20.2031-7," or an expression of like import. The regulations thus leave room for departure from strict application of the tables.

Departure from mortality tables because of unusual circumstances has been consistently allowed in cases involving the determination of the size of charitable remainders for purposes of the charitable deduction from the estate tax. The seminal case in this area, *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929), is relied on by taxpayers

here because it was one in which actuarial tables were employed. The estate in question included a trust with a life estate to the testator's wife, coupled with a power to invade the corpus, and remainder to charity. The testator's widow died six months after him, and the contention was advanced that the value of the charitable remainder, deductible for estate tax purposes, should be what it was at the widow's death rather than what would have been predictable by the use of mortality tables at the time of the testator's death. The Court, per Justice Holmes, rejected this argument, and concluded that the charitable remainder must be valued as of the date of the testator's death. The Court stated that value "as the word is used by the law . . . depends largely on more or less certain prophecies of the future, and the value is no less real at that time if later the prophecy turns out false than when it comes out true." 279 U.S. at 155. This case is quite unlike to one in which the life tenant's death was certain to be imminent at the time of the testator's death.

The next Supreme Court case in this area was *United States v. Provident Trust Co.*, 291 U.S. 272 (1934). There, the testator had established a trust in which his daughter had a life estate, with remainder to her lawful issue and contingent remainders, should she die without issue, to designated charitable institutions. At the date of the testator's death, the daughter was age 50, without issue, unmarried and had had her reproductive organs surgically removed. There was no medical possibility that she could ever bear a child. The government argued that since the value of the charitable contingent remainder could not be established, the deduction should be disallowed. The right to the charitable deduction was sustained, however, notwithstanding the well-established presumption, on which the government relied, that a woman is capable of bearing children as long as she lives. The following language of the Court is the nub of the decision:

> The sole question to be considered is — What is the value of the interest to be saved from the tax? That is a practical question, not concluded by the presump-

> tion invoked but to be determined by ascertaining in terms of money what the property constituting that interest would bring in the market, subject to such uncertainty as ordinarily attaches to such an inquiry. See Ithaca Trust Co. v. United States, 279 U.S. 151, 73 L. ed. 647, 49 S. Ct. 291, supra. Thus stated the birth of a child to the daughter of the deceased after his death was so plainly impossible that, as a practical matter, the hazard disappears from the problem. Certainly, in the light of our present accurate knowledge in respect of the subject, if the interest had been offered for sale in the open market during the daughter's lifetime, a suggestion of the possibility of such an event would have been ignored by every intelligent bidder as utterly destitute of reason.

291 U.S. at 286.

Subsequent decisions of the Tax Court depart from strict application of actuarial tables where there is reasonable certainty that use of the tables would violate reason and fact. *Estate of Jennings v. Commissioner,* 10 T.C. 323 (1948), is a good example. There, a charitable remainder was subject to a life estate and to the trustee's broad power to invade principal for the care and maintenance of the life tenant. Although the Commissioner argued that the charitable remainder was incapable of valuation because the life tenant's maintenance and medical expenses far exceeded the income of the trust, the deduction for a charitable gift was allowed because it was shown that the life tenant was seventy-three, in a very precarious state of health, and had a life expectancy of not more than one year. In fact, his death followed that of the testatrix by two months. Specifically, the Court approved departure from mortality tables when "the proven facts show a less life expectancy." 10 T.C. at 328. To the same effect are *Huntington National Bank v. Commissioner,* 13 T.C. 760 (1949); *Estate of Butler v. Commissioner,* 18 T.C. 914 (1952); and *Estate of Hoelzel v. Commissioner,* 28 T.C. 384 (1957). See also *Commissioner v. Sternberger,* 348 U.S.

187 (1955), in which the Court denied any deduction for a charitable bequest of a contingent remainder, notwithstanding a clear legislative direction to allow deductions for charitable gifts, because of the unlikelihood that the remainder would even vest.

Taxpayers rely on another line of cases involving the value of life insurance policies owned by decedents who were killed in common accidents with their insureds under circumstances where proof of order of death was unavailable. *Old Kent Bank and Trust Co. v. United States*, 292 F.S. 48 (W.D. Mich. 1968), reversed in 430 F. 2d 392 (6 Cir. 1970); *Estate of Chown v. Commissioner*, 51 T.C. 140 (1968), reversed in 428 F. 2d 1395 (9 Cir. 1970); *Estate of Wien v. Commissioner*, 51 T.C. 287 (1968), appeal pending to the Fifth Circuit. In these cases statutory presumptions established that the insureds were to be treated as having survived; the issue in each case was whether the value of the policy held by the deceased owner was to be treated as inflated by the imminent death of the insured. In *Old Kent*, the district court held that the value of the policy was zero; in *Chown* and *Wien*, the Tax Court held that the value was the face amount. The Sixth and Ninth Circuits reversed in *Old Kent* and *Chown*, holding that the value was "the interpolated terminal reserve," with certain adjustments. We express no view on the conflict between the Tax Court and the Sixth and Ninth Circuits. There will be time enough to decide the question when we reach and decide *Estate of Meltzer v. Commissioner*, No. 15,015, now pending before us on appeal from the Tax Court. See P. H. Memo. T.C. § 70,062.

But what distinguishes these cases from the instant case is the measure of value established by the Commissioner's regulations. The regulation for fixing the value of a life estate for purposes of a tax credit is to apply "recognized valuation principles" and these may be, but not necessarily are, to employ actuarial and mortality tables. By contrast, the regulations for valuation of an insurance policy on the life of another direct that that value "is established through the sale by that company of comparable contracts" (Regu-

lation § 20.2031-8(a)(1)) and then recognize that "[a]s valuation of an insurance policy through sale of comparable contracts is not readily ascertainable when, at the date of decedent's death, the contract has been in force for some time and further premium payments are to be made," resort should be had to the interpolated terminal reserve with certain adjustments. (Regulation § 20.2031-8(a)(2)). The only exception is the statement that if "because of the unusual nature of the contract" the interpolated terminal reserve method "is not reasonably close to the full value of the contract, this method may not be used" (Regulation § 20.2031-8(a)(2)). However, in the case of simultaneous death of the decedent-owner of the policy and the insured, it is the circumstances of the deaths which is unusual, not the "nature of the contract," *Old Kent Bank and Trust Company v. United States*, 430 F. 2d 392, 394, so that this limited exception is not available. Because of these differences between Regulations §§ 20.2013-4 and 20.2031-8, we find cases arising under the latter unpersuasive as to the problem at hand.

The district court opinion in *Old Kent*, besides considering the valuation of an insurance policy, decided the legal issue involved here. The wife's will also created a trust with a life estate in her husband and the husband's estate sought a credit under § 2013 based upon the value of his life interest. Since the parties died in a common accident under circumstances where there was no proof that they died other than simultaneously, the district court ruled that the husband's life estate, for purposes of tax credit, had no value because at the time of the wife's death the husband's death was apparent or inevitable so that a prospective buyer, knowing the facts, would bid nothing. 292 F.S. 53-55. This holding was not questioned on appeal and fully supports our decision.

We conclude, therefore, that in the exceptional case the actuarial tables in the regulations need not be applied. Where at the time of the transferor's death it was unmistakable to one in possession of the facts that the transferee's life would be radically shorter than predicted in the actu-

arial tables, the value of a transferred life estate may be reduced accordingly for purposes of calculating the tax credit under § 2013.

Here, the only reasonable conclusion is that Mrs. Lion's life estate was valueless at the instant of its creation and its destruction. If the life estate, in fact, ever vested, it terminated moments thereafter. One cannot imagine that a buyer in the market place would pay anything for a life estate, no matter how substantial the res, which could last, at most, for only moments. Recognized valuation principles point unerringly to a zero value of Mrs. Lion's life estate.

The judgment of the Tax Court is

AFFIRMED.

APPENDIX B

Tax Court of the United States

Estate of Gloria A. Lion, deceased, Morton E. Rome and George L. Clarke, Executors,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

Docket No. 5114-67 Filed June 30, 1969

Robert P. Mittelman, for the Petitioners.

George K. Dunham, for the Respondent.

H and W were killed in an airplane crash under circumstances such that there is not sufficient proof to deter-

mine the chronology of their deaths. H's will provided for a trust; the net income going to W during her life and upon her death the corpus to be divided into two equal shares, one share for each of H and W's two children. H's will further provided that if W shall die under circumstances that there is no sufficient proof to determine the order of the deaths of H and W, then W shall be deemed to survive H.

Held: For purposes of calculating a credit for prior estate taxes under section 2013 in W's estate, assuming *arguendo* that a "transfer" of W's life estate in the trust created under H's will had been made from H's estate to W, nevertheless W's life estate had no value in H's estate at the time of H's death and therefore no section 2013 credit is allowable to W's estate with respect to W's life estate in the trust.

KERN, *Judge:* The respondent has determined a gross deficiency in federal estate taxes in the amount of $129,113.77 and a net deficiency of $69,016.76 upon allowing additional credit for state death taxes allowable if substantiated in the amount of $60,097.01.

Petitioner does not contest any of the adjustments in decedent's taxable estate made by respondent in his "Statement" attached to the notice of deficiency. However, petitioner alleges that respondent erred in denying an additional credit in the amount of approximately $121,309.27 under section 2013, I.R.C. 1954,[1] based upon the value of a life estate as affected by various provisions for invasion of corpus, bequeathed to decedent by her husband who died simultaneously with her. This claim for additional credit was made by petitioner after the estate tax return was filed and was disallowed by respondent in his notice of deficiency. The parties have stipulated that the exact amount of petitioner's section 2013 credit, if allowed, is subject to computation under Rule 50. The parties have also agreed that the petitioner may be entitled to an addi-

[1] Hereafter all statutory references are to the Internal Revenue Code of 1954 unless otherwise indicated.

tional deduction upon the payment of attorney's fees and expenses which will be determined in a Rule 50 computation.

This case was submitted on a complete stipulation of facts pursuant to Rule 30. The stipulation and the exhibits attached thereto are incorporated herein by this reference and are adopted as our Findings of Fact. A summary of the pertinent facts is set forth below.

Morton E. Rome and George L. Clarke, with offices now, and at the time of filing of the petition in this proceeding, located at 10 Light Street, Baltimore, Maryland, are executors of the Estate of Gloria A. Lion, petitioner. An estate tax return was filed on behalf of petitioner with the district director, Baltimore, Maryland.

Gloria Lion and her husband, Albert, "were traveling by air in the Middle East when their plane crashed near Cairo, United Arab Republic, on or about May 12, 1963 and both were killed under circumstances such that there is no sufficient proof to determine the chronology of their deaths."[2] There were no survivors and no identifiable remains of either Gloria or Albert could be recovered from the scene of the crash. Gloria was 45 years old at the time of her death.

The will of Albert Lion, duly admitted to probate, contained the following paragraph:

> Fifth: If my wife Gloria A. Lion, shall die simultaneously with me or under such circumstances that there is no sufficient proof to determine which of us predeceased the other, I direct that my said wife shall be deemed to have survived me, and that the provisions of this Will shall be construed upon that presumption, notwithstanding the provisions of any law establishing a different presumption in the order of death.

Albert's will also provided, in general, that after payments of debts, funeral expenses, certain taxes, and be-

[2] This quoted language is from the stipulation.

quests of certain tangible personal property, the rest and residue of his estate was to be divided into two equal parts each one subject to a trust. One trust, denominated the "Marital Trust," provided for the payment of the net income of that part to Gloria during her life and the remainder to whomever she would appoint by her will. There were also provisions for invasion of corpus for the benefit of Gloria under various conditions. The estate of Albert Lion claimed a marital deduction based upon the value of the corpus of this trust, and the corpus of this trust was included in Gloria's estate in the estate tax return filed by the petitioner.

With regard to the other equal part of the residue of his estate, Albert's will provided in pertinent parts as follows:

> C. In the event that my said wife, Gloria A. Lion, be living at the time of my death, the second and said equal parts of said rest, residue and remainder, as hereinabove defined, shall be paid over to Gloria A. Lion, Reuben Oppenheimer and Morton E. Rome, or the survivors or survivor, Trustees, in a Trust separate and apart from the "Marital Trust", for the uses and purposes hereinafter set forth.
>
> * * * * * *
>
> 1. The Trustees shall pay over the entire net income of the Estate in periodic installments, as nearly equal as possible, unto my wife, Gloria A. Lion, during the term of her natural life.
>
> 2. The said Gloria A. Lion, in addition to the income payments hereinabove provided, shall have the power to withdraw, in her sole discretion, amounts out of the corpus of this Trust Estate not exceeding Five Thousand Dollars ($5,000.00) in each calendar year, this power of annual withdrawal hereby granted unto the said Gloria A. Lion shall not be cumulative from year to year.
>
> 3. In addition, while my said wife, Gloria A. Lion, is living, Reuben Oppenheimer and Morton E. Rome, Trustees (excluding Gloria A. Lion, Trustee) are here-

by authorized in each and every calendar year to pay to the said Gloria A. Lion, in addition to the income of the Trust, a sum or sums from the corpus of the Trust Estate not in excess of Five Thousand Dollars ($5,000.00), provided that in the opinion of the said Reuben Oppenheimer and Morton E. Rome (excluding Gloria A. Lion, Trustee) there are such circumstances that render such payment of corpus to the said Gloria A. Lion desirable. * * *

* * * * * *

Upon Gloria's death the trust corpus was to be divided into two separate trusts for the benefit of the 2 children of Albert and Gloria. The trust of each child was to exist until the child reached age forty (40), at which time the trust would terminate and the corpus be distributed. Neither the corpus of this nonmarital trust nor the value of any life estate therein was included in petitioner's estate tax return.

Petitioner's estate tax return was audited by the respondent. As a result of this audit there were adjustments in the valuation of certain assets listed in the return with the result that a deficiency in estate tax was determined in the amount of $129,113.77. During the course of the audit, petitioner made a claim for a credit pursuant to section 2013 of the Code. The claimed credit was based upon and measured by the life estate with respect to the second trust created by Albert's will. The amount of the claimed credit was computed by assigning to the life estate in the trust a value based upon the *present value* factor of life expectancy of a person 45 years old and multiplying this factor by the value of the corpus of the second trust at the time of Albert's death.

The parties have stipulated certain government statistics which according to petitioner's brief "demonstrate that commercial airline passengers have very high rates of survival of airline accidents." The petitioner points to the following facts as established by these exhibits; passenger-miles flown during the period 1954-1964 increased from

21.3 billion to .61 billion; passenger fatality rates during that period per 100 million passenger-miles ranged from .07 to .26; with minor variations the figures for the period 1956-1966 were the same; in 1963 there were 49 accidents, 5 of which caused fatalities; and for the 5-year period 1962-66 international carriers had 16.3% of their accidents result in fatal injury, 38.8% in serious injury and 44.9% in minor or no injury.

The respondent, in his statutory notice of deficiency, determined that the claimed credit under section 2013 was not allowable for the following reasons:

> Gloria Lion perished simultaneously with her husband, Albert Lion, in a plane crash near Cairo, United Arab Republic, on May 12, 1963; even if Gloria Lion received a life estate, its momentary existence was due to a presumption and it was neither enjoyed by her nor did it enable her to enlarge her gross estate; even if the life estate technically qualified for credit under section 2013, its short duration would result in only de minimis credit.

The language of section 2013 pertinent to the instant controversy is as follows:

> Sec. 2013. Credit for Tax on Prior Transfers
>
> (a) General Rule. — The tax imposed by section 2001 shall be credited with all or a part of the amount of the Federal estate tax paid with respect to the transfer of property (including property passing as a result of the exercise or non-exercise of a power of appointment) to the decedent by or from a person (herein designated as a "transferor") who died within 10 years before, or within 2 years after, the decedent's death. If the transferor died within 2 years of the death of the decedent, the credit shall be the amount determined under subsections (b) and (c). * * *
>
> * * * * * *
>
> (d) Valuation of Property Transferred. — The value of property transferred to the decedent shall be the

value used for the purpose of determining the Federal estate tax liability of the estate of the transferor * * *.

(e) Property Defined. — For purposes of this section, the term "property" includes any beneficial interest in property, including a general power of appointment (as defined in section 2041).

Pertinent portions of respondent's Estate Tax Regulations are set forth in the margin below.[3]

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[3] Sec. 20.2013-1. Credit For Tax on Prior Transfers.

(a) In general. A credit is allowed under section 2013 against the Federal estate tax imposed on the present decedent's estate for Federal estate tax paid on the transfer of property to the present decedent from a transferor who died within ten years before, or within two years after, the present decedent's death. See section 20.2013-5 for definition of the terms "property" and "transfer." There is no requirement that the transferred property be identified in the estate of the present decedent or that the property be in existence at the time of the decedent's death. It is sufficient that the transfer of the property was subjected to Federal estate tax in the estate of the transferor and that the transferor died within the prescribed period of time. The executor must submit such proof as may be requested by the district director in order to establish the right of the estate to the credit.

* * * * * *

Sec. 20.2013-4. Valuation of Property Transferred.

(a). For purposes of section 2013 and section 20.2013-1 through 20.2013-6, the value of the property transferred to the decedent is the value at which such property was included in the transferor's gross estate for the purpose of the Federal estate tax (see sections 2031, 2032, and the regulations thereunder) reduced as indicated in paragraph (b) of this section. If the decedent received a life estate or remainder or other limited interest in property included in the transferor's gross estate, the value of the interest is determind as of the date of the transferor's death on the basis of recognized valuation principles (see especially section 20.2013-7).

* * * * * *

Sec. 20.2013-5. "Property" and "Transfer" Defined.

(a) For purposes of section 2013 and sections 20.2013-1 through 20.2013-6, the term "property" means any beneficial interest in property, including a general power of appointment (as defined in section 2041) over property. Thus, the term does not include an interest in property consisting merely of a bare legal title, such as that of a trustee. Nor does the term include a power of appointment over

Petitioner contends that the life estate in the nonmarital trust "passed" to Gloria within the meaning of respondent's Regulation section 20.2013-5(b) and therefore there was a "transfer" to Gloria from a "transferor" (Albert) of "property" (the life estate), all within the meaning of section 2013. Citing *Ithaca Trust Co. v. United States*, 279 U.S. 151, certain portions of the legislative history relating to section 2013 and certain of respondent's regulations and revenue rulings, petitioner further contends that for purposes of the section 2013 credit the life estate in the nonmarital trust should be valued by using recognized actuarial tables rather than by reference to the actual events leading to the deaths of Albert and Gloria.

Respondent has contended orally and on brief that petitioner has failed to carry its burden of proving that there was a "transfer" of the life estate in the nonmarital trust under Albert's will to Gloria within the meaning of that term as it appears in section 2013.

In the alternative respondent argues that in order to determine any credit under section 2013 it is necessary for petitioner to establish the value of the life estate bequeathed to the "nonmarital trust" at the date of Albert's death, that under the circumstances of this case the life estate of Gloria in that trust had no value and therefore, even if there had been a "transfer" of the life estate to Gloria, no credit would be available under section 2013.

Since we agree with respondent's alternative contention, it is unnecessary for us to decide the question of whether there was the transfer of property required by the provisions of section 2013.

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property which is not a general power of appointment (as defined in section 2041). Examples of property, as described in this paragraph, are annuities, life estates, estates for terms of years, vested or contingent remainders and other future interests.

(b) In order to obtain the credit for tax on prior transfers, there must be a transfer of property described in paragraph (a) of this section by or from the transferor to the decedent. The term "transfer" of property by or from a transferor means any passing of property or an interest in property under circumstances which were such that the property or interest was included in the gross estate of the transferor. * * *

A recent case closely analogous to the one before us is *Old Kent Bank and Trust Co. v. United States*, 292 F. Supp. 48 (U.S.D.C., W.D. of Mich., Nov. 4, 1968) in which a husband and a wife died simultaneously in an air crash and a credit was claimed under section 2013 on account of a life estate granted by will by one spouse to the other. It was held that valuing the life estate at the time of the transferor's death, its value to the transferee was zero. The Court said that on the facts which existed and could have been discovered by a hypothetical buyer at the time of death such "a hypothetical buyer would have paid nothing for the life interest of [the transferee], since his life would be immeasurably short * * *." Accordingly the claimed tax credit under section 2013 was denied.

The rationale of that part of the opinion of the cited case which deals with the credit claimed under section 2013 is in accord with the rationale of this Court in *Estate of Roger M. Chown*, 51 T.C. 140, which considered the valuation of an insurance policy under similar circumstances. See also, *Estate of Ellen M. Wien*, 51 T.C. 287.

In our opinion the analysis and solution of the problem involving the credit claimed under section 2013 made by the Court in the *Old Kent Bank and Trust Co.* case were correct.

It is also our opinion that the statistics stipulated by the parties having to do with the rate of survival in reported commercial airline accidents are irrelevant. What are relevant are the facts affecting Gloria's life expectancy with respect to this particular airline accident as they existed and could have been discovered by a hypothetical buyer of Gloria's life estate at the time of Albert's death; and the salient fact was that Gloria and Albert were both hurtling to their deaths in the same airline crash. If a reference to a hypothetical buyer of the life estate under these circumstances would seem to have "an unreal quality,"[4] we can only say that in our opinion the valuation

[4] See concurring opinion of Fay, J., in *Estate of Roger M. Chown*, *supra*, at 144.

resulting from the hypothetical reaction of a hypothetical buyer on the assumed knowledge of the actual facts has more practical reality than a valuation resulting from the application in a factual vacuum of actuarial tables and mathematical formulae regardless of their statistical elegance. See *United States v. Provident Trust Co.*, 291 U.S. 272.

We therefore decide that, assuming *arguendo* that a "transfer" of the life estate in the nonmarital trust under Albert's will had been made from Albert to Gloria, nevertheless the life estate had no value for the purpose of computing a credit for prior estate taxes paid with respect thereto under the provisions of section 2013. Hence we hold that the credit claimed by petitioner under section 2013 with respect to that life estate must be disallowed.

To reflect the allowance of certain deductions and credits available to petitioner which are not in dispute.

Decision will be entered under Rule 50.

DECISION

Pursuant to the opinion of the Court filed June 30, 1969, and incorporating herein the facts recited in the respondent's computation as the findings of the Court it is

ORDERED and DECREED: That there is a deficiency in estate tax due from the petitioner in the amount of $129,113.77.

(Signed) JOHN W. KERN,
Judge.

Entered: Sep. 24, 1969.

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

It is further stipulated that the petitioner may claim credit for State estate, inheritance, legacy or succession

taxes and may present to the Internal Revenue Service proof of such payment within the statutory period.

It is also stipulated that petitioner may claim a deduction for attorney's fees and expenses incurred in litigating the instant case upon payment thereof, and that petitioner may present to the Internal Revenue Service proof as to such deduction within the applicable statutory period.

ROBERT P. MITTELMAN,
Counsel for Petitioner.
(signed) K. MARTIN WORTHY,
GJR
Chief Counsel,
Internal Revenue Service.

APPENDIX C

U. S. Treasury Department
Internal Revenue Service
Office of Regional Commissioner
Appellate Division, Mid-Atlantic Region
934 Federal Building
31 Hopkins Plaza :AVW:HR
Baltimore, Maryland 21201

Date of Death: May 12, 1963

Deficiency: $129,113.77

July 28, 1967

Estate of Gloria A. Lion
Morton E. Rome and
George L. Clarke, Executors
313 Keyser Building
Baltimore, Maryland 21202

Dear Messrs. Rome and Clarke:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of the estate tax liability of the above named estate discloses

a deficiency in the amount shown above. The attached statement shows the computation of the deficiency.

If you do not intend to contest this determination in the Tax Court of the United States, please sign the enclosed Waiver and return it promptly in the enclosed envelope. This will permit early assessment of the deficiency or deficiencies and limit accumulation of interest.

If you do not sign and return the Waiver, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of 90 days from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules. A copy of the rules of the Court may be obtained by writing to the Clerk, Tax Court of the United States, Box 70, Washington, D. C. 20044.

Very truly yours,

SHELDON S. COHEN,
Commissioner.

By A. F. WILKINSON,
Chief, Appellate Branch Office.

Enclosures — 3:
Statement
Waiver
Return envelope

Ap:Bal:AVW:HR

Statement
Estate of Gloria A. Lion
Morton E. Rome and George L. Clarke, Executors
313 Keyser Building
Baltimore, Maryland 21202

Date of Death: May 12, 1963

	Deficiency
Estate Tax	$129,113.77

Upon receipt of a waiver or upon the expiration of 90 days from the date of this letter, if a petition is not filed with the Tax Court of the United States the deficiency of $129,113.77 will be assessed in the event that evidence of the payment of the state, territorial estate, inheritance, legacy, or succession taxes as required by Section 20.2011 of the Regulations is filed within the 90 day period, the net deficiency of $69,016.76 will be assessed.

The issue raised in your protest requesting a credit in the amount of $121,309.27 under the provisions of Section 2013 of the Internal Revenue Code for tax on prior transfers has been given careful consideration and it has been determined that no credit is allowable for the reasons that Gloria Lion perished simultaneously with her husband, Albert Lion, in a plane crash near Cairo, United Arab Republic, on May 12, 1963; even if Gloria Lion received a life estate, its momentary existence was due to a presumption and it was neither enjoyed by her nor did it enable her to enlarge her gross estate; even if the life estate technically qualified for credit under Section 2013, its short duration would result in only de minimis credit.

If a petition to the Tax Court of the United States is filed against the deficiency proposed herein, the pending issue of credit for tax on prior transfers should be made part of the petition to be considered by the Tax Court of the United States in any redetermination of the estate tax liability.

A copy of this letter and statement has been mailed to your representative, Robert P. Middleman, 10 Light Street, Baltimore, Maryland 21202, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Adjustments to Taxable Estate

Taxable estate as disclosed by return	$1,172,355.78
Additions to value of taxable estate and decrease in deductions:	
(a) Stocks and Bonds	98,375.00
(b) Mortgages, notes, and cash	9,969.74
(c) Other miscellaneous property	88,065.19
(d) Expenses incurred in administering property subject to claim	4,000.00
Taxable estate as adjusted	$1,372,765.71

Explanation of Adjustments

(a) Stocks and Bonds — Schedule B

	Return	*Determined*
Item (3) 3,935 shares common stock Lion Brothers Company, Inc.	$373,825.00	$472,200.00

Taxable estate is increased $98,375.00 to reflect a fair market value of $120.00 per share on the basis of earnings, book value, and all applicable data relative to the valuation of close corporation stock.

(b) Mortgages, notes and cash—Schedule C
Additional Item:

It is determined that a savings account in the Maryland National Bank in the amount of $9,969.74 is includable in the gross estate. Since this savings account was not reported in the estate tax return, the taxable estate is increased $9,969.74.

(c) Other Miscellaneous Property—
Schedule F

	Return	*Determined*
Item (7)	$540,000.00	$628,065.19

The above item is increased to the value of the marital distribution from the estate of Albert Lion, the deceased husband of the decedent. Therefore, the taxable estate is increased $88,065.19.

(d) Expenses incurred in administering property subject to claims — Schedule J

	Return	*Determined*
Item (B-1) Executor's Commissions	$ 54,000.00	$ 50,000.00

The taxable estate is increased $4,000.00 to reflect the amount that has been approved by the Probate Court and paid or to be paid by the estate and approved by the Probate Court for executor's commission.

Computation of Estate Tax

Taxable estate		$1,372,765.71
Gross estate tax		$ 474,761.60
Credit for state death taxes		None
Estate Tax Liability		$ 474,761.60
Estate tax assessed: Original return account No. DT 50023		345,647.83
Deficiency		$ 129,113.77
Gross deficiency	$129,113.77	
Credit allowable — if substantiated	60,097.01	
Net deficiency	$ 69,016.76	

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SUPREME COURT, U. S.

No. 1709

Supreme Court, U.S.
FILED
JUN 11 1971
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70-165

In the Supreme Court of the United States

OCTOBER TERM, 1970

ESTATE OF GLORIA A. LION, Deceased, MORTON E. ROME and GEORGE L. CLARKE, Executors,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

JOHNNIE M. WALTERS,
Assistant Attorney General,

THOMAS L. STAPLETON,
CAROLYN R. JUST,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1703

ESTATE OF GLORIA A. LION, Deceased, MORTON E. ROME and GEORGE L. CLARKE, Executors,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. 11a-20a) is reported at 52 T.C. 601. The opinion of the court of appeals (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1971. The petition for a writ of

certiorari was filed on May 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner estate was entitled to the estate tax credit allowed by Section 2013 of the Internal Revenue Code with regard to previously taxed property, where a life estate bequeathed to decedent by her husband, who died simultaneously with her, had no value.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 2013 of the Internal Revenue Code of 1954, and Section 20.2013-4 of the Treasury Regulations on Estate Tax (1954 Code) are set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

On May 12, 1963, Gloria A. Lion, then 45 years old, and her husband, Albert, were killed, near Cairo, United Arab Republic, in an airplane crash. The circumstances were such that there was insufficient proof to determine the chronology of their deaths. (Pet. App. 13a.)

Albert's will stated a presumption of his wife's survivorship in the event of simultaneous deaths, or in the event of deaths under circumstances making proof of the chronology of their deaths insufficient. His will created both a marital trust and a residuary trust. The residuary trust was for the benefit of Gloria for life, and on her death in trust for the benefit of the couple's two children. (Pet. App. 13a-15a.)

Section 2013 of the Internal Revenue Code, Appendix, *infra*, p. 7, provides for a credit against estate tax of all or a portion of the estate tax paid with respect to property transferred to the decedent within 10 years before the decedent's death. In reliance on this provision, petitioners claimed a credit based on and measured by the life estate created under the residuary trust in Albert's will, and allegedly transferred to Gloria. For purposes of computing the estate tax paid by Albert's estate with respect to Gloria's life estate, petitioners used the present value factor of life expectancy for a woman 45 years old, and multiplied this factor by the value of the residuary trust at the time of Albert's death. The Commissioner disallowed the credit, and petitioners sought a redetermination in the Tax Court. (Pet. App. 15a.)

That court reasoned that in order to be entitled to the Section 2013 credit, petitioners were required to show the value, if any, of Gloria's life estate as of the time of Albert's death. Taking into account the special circumstances at that time, *i.e.*, the death or imminent death of Gloria, the court found that Gloria's life estate had no value. It accordingly held that even if there had been a transfer of the life estate from Albert to Gloria, no credit would be available under Section 2013. (Pet. App. 18a-20a.) The court of appeals affirmed (Pet. App. 1a-11a).

ARGUMENT

The decision below is correct. There is no conflict or any other basis for further review.

1. It is true, as a general principle of valuation, that life interests should be valued on the basis of actuarial expectancy rather than by reference to actual subsequent events. But, contrary to petitioners' claim (Pet. 7, 13-14), there is no requirement under Section 20.2013-4 of the Treasury Regulations on Estate Tax, Appendix, *infra*, pp. 7-8, that such tables must be used when, at the time of valuation, there are compelling facts which indicate a value other than actuarial value. Where the facts conclusively show that a life tenant cannot or will not live out his or her actuarial life, the courts have held that actuarial tables need not be used, and that value may be determined by reference to the actual facts at the critical time. See *Estate of Hoelzel* v. *Commissioner*, 28 T.C. 384; *Estate of Butler* v. *Commissioner*, 18 T.C. 914; *Huntington National Bank* v. *Commissioner*, 13 T.C. 760; *Estate of Jennings* v. *Commissioner*, 10 T.C. 323; see also Rev. Rul. 66-307, 1966-2 Cum. Bull. 429; *Commissioner* v. *Sternberger*, 348 U.S. 187.

Here, the actual facts make it apparent that at the time of Albert's death—the event causing the life estate to come into being—the decedent either was already dead, or was about to die momentarily. The property interest in question therefore had no value at the critical time, or at best an incalculable *de minimus* value. To allow a credit based on the life expectancy of a 45-year old woman would, under these circumstances, "prefer fiction to reality and * * * defeat the clear purpose" of Section 2013. See *Commissioner* v. *Estate of Shively*, 276 F. 2d 372, 375 (C.A. 2).

2. There is no merit to petitioners' claim (Pet. 10-12) that the court of appeals failed to give effect to the legislative history of Section 2013, relating to the meaning of the term "transfer of property." The court did not rest its holding on the presence or absence of a transfer, but rather on the fact that, whether or not there was a transfer, the life estate had no value. The court's remarks regarding the transfer question were not essential to its holding.

3. The decision below is not inconsistent with *Ithaca Trust Co.* v. *United States*, 279 U. S. 151; *United States* v. *Provident Trust Co.*, 291 U. S. 272; *Commissioner* v. *Sternberger*, 348 U. S. 187; and *Bankers Trust Co.* v. *Higgins*, 136 F. 2d 477 (C.A. 2), upon which petitioners rely (Pet. 8-10). These cases all arise on facts wholly different from those here. Moreover, none of them suggests that actuarial tables must be used where, as here, there is absolute certainty that their use would violate reason and fact.[1] See Pet. App. 7a-9a.

Nor is there a conflict with cases involving the valuation of life insurance policies owned by decedents who were killed in common accidents, as petitioners contend (Pet. 12-15). See *Estate of Wien* v. *Commissioner*, No. 27828 (C.A. 5), decided April 12, 1971; *Estate of Meltzer* v. *Commissioner*, No. 15,015 (C.A. 4), decided March 12, 1971; *Old Kent Bank*

[1] There is similarly no basis for the contention (Pet. 7, 14) that the court below should have allowed the credit because of statistics of survival in airliner accidents. Resort to such general statistics is unnecessary in view of the actual fact of the life tenant's death.

and Trust Co. v. *United States*, 430 F. 2d 392 (C.A. 6); *Estate of Chown* v. *Commissioner*, 428 F. 2d 1395 (C.A. 9). As the Fourth Circuit recognized in its own *Meltzer* case, *supra*, slip. op., pp. 4-6, and in its opinion here (Pet. App. 9a-10a), the valuation of life insurance policies is governed by Regulations 20.2031-8(a)(1) and (2). Those Regulations provide that value is to be determined by reference to sales by the insurer of comparable contracts, and require a valuation based on interpolated reserves except where the insurance contract itself is of an unusual nature. In contrast to this "relatively inflexible valuation method" (*Meltzer*, *supra*, slip op., p. 6), Regulations 20.2013-4, applicable in the instant case, provide merely that the value of a life estate, for purposes of the Section 2013 credit, is to be ascertained by recognized valuation principles—which may, but need not necessarily, employ actuarial and mortality tables.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

THOMAS L. STAPLETON,
CAROLYN R. JUST,
Attorneys.

JUNE 1971.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2013. CREDIT FOR TAX ON PRIOR TRANSFERS.

(a) *General Rule.*—The tax imposed by section 2001 shall be credited with all or a part of the amount of the Federal estate tax paid with respect to the transfer of property (including property passing as a result of the exercise or non-exercise of a power of appointment) to the decedent by or from a person (herein designated as a "transferor") who died within 10 years before, or within 2 years after, the decedent's death. If the transferor died within 2 years of the death of the decedent, the credit shall be the amount determined under subsections (b) and (c). * * *

* * * *

(d) *Valuation of Property Transferred.*—The value of property transferred to the decedent shall be the value used for the purpose of determining the Federal estate tax liability of the estate of the transferor * * *

* * * *

(e) *Property Defined.*—For purposes of this section, the term "property" includes any beneficial interest in property, including a general power of appointment (as defined in section 2041).

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

Sec. 20.2013-4 *Valuation of property transferred.*

(a) For purposes of section 2013 and §§ 20.-2013-1 to 20.2013-6, the value of the property transferred to the decedent is the value at which such property was included in the transferor's gross estate for the purpose of the Federal estate tax (see sections 2031, 2032, and the regulations thereunder) reduced as indicated in paragraph (b) of this section. If the decedent received a life estate or remainder or other limited interest in property included in the transferor's gross estate, the value of the interest is determined as of the date of the transferor's death on the basis of recognized valuation principles (see especially § 20.2031-7). * * *

* * * *

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